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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1931.

No. [redacted] 97

JACK GEBARDI and LOUISE ROLFE GEBARDI,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

WILLIAM F. WAUGH,
Attorney for Jack Gebardi and Louise Rolfe Gebardi, Petitioners.

CHICAGO LAW PRINTING CO., 101 S. WELLS ST. FRANKLIN 6821

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IN THE

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OCTOBER TERM, A. D. 1931.

No.

JACK GEBARDI and LOUISE ROLFE GEBARDI,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

Petition for Writ of Certiorari.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioners, Jack Gebardi and Louise Rolfe Gebardi, hereinafter referred to as Louise Rolfe, respecfully seek a review of a decision of the Circuit Court of Appeals for the Seventh Circuit affirming their conviction upon an indictment containing three counts charging them with having conspired to violate Section 398, Title 18, U. S. C. A.[1]

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[1]Sec. 398, Title 18, U. S. C. A.

Any person who shall knowingly transport or cause to be tansported, or aid or assist in obtaining transportation for, or in transporting, in interstate or foreign commerce, * * * any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose, * * * shall be deemed guilty of a felony, and upon conviction thereof shall be punished, etc.

(White Slave Traffic Act), in violation of Section 88, Title 18, U. S. C. A.[2], and sentencing the petitioner Gebardi to imprisonment in the penitentiary for a period of two years on each of Counts 1, 2 and 3, the sentences to run consecutively. The sentences on Counts 2 and 3 are to be suspended at the expiration of the sentence on Count 1, and the petitioner to be placed on probation for a period of five years. The petitioner Rolfe was sentenced to be imprisoned in the Cook County jail at Chicago, Illinois for a period of four months.

A.

Summary Statement of Matters Involved.

First. This case presents the question as to whether or not an agreement between a man and woman to transport the woman in interstate commerce for the purpose of having sexual intercourse during and following a journey, practically continuous, from Chicago, Illinois, to Miami, Florida, to Chicago, to Jacksonville, Florida, to St. Augustine, Florida, to Gulfport, Mississippi, and back to Chicago, was punishable as three separate and distinct conspiracies to violate Section 398, Title 18, U. S. C. A.

Second. The question is presented as to whether or not the decision in *U. S.* v. *Holte,* 236 U. S. 140, is authority for the proposition that the consent of a woman to travel

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[2]Sec. 88, Title 18, U. S. C. A.

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both.

with a man in interstate commerce for the purpose of having sexual intercourse with him constitutes a conspiracy to transport the woman.

Third. This case presents the question as to whether or not proof of sexual intercourse, during and following transportation in interstate commerce, between a married man and an unmarried woman who had lived in a state of adultery for more than three years prior thereto, established that the transportation was for an immoral purpose.

B.

Reasons Relied on for Allowance of the Writ.

1. The holding of the Circuit Court of Appeals that an agreement between a man and woman to transport the woman in interstate commerce for the purpose of having sexual intercourse during and following said journey was punishable as three separate and distinct conspiracies to violate Section 398, Title 18, U. S. C. A., is in conflict with the weight of authority and is violative of the rights of petitioners under the Fifth Amendment to the Constitution of the United States.

2. The Circuit Court of Appeals has decided an important question of general law in a way probably untenable in holding the decision in *U. S.* v. *Holte*, 236 U. S. 140, as authority for the proposition that the consent of a woman to travel with a man in interstate commerce for the purpose of having sexual intercourse with him constitutes a conspiracy to transport the woman.

3. The holding of the Circuit Court of Appeals that proof of sexual intercourse, during and following the transportation in interstate commerce, between a man and a woman who had lived in a state of adultery prior thereto,

established that the transportation was for an immoral purpose, is in conflict with the decisions of the Circuit Court of Appeals for the Second Circuit in *Alpert* v. *U. S.*, 12 Fed. (2d), 352; the Circuit Court of Appeals for the Fourth Circuit in *Fisher* v. *U. S.*, 266 Fed. 667; *Hunter* v. *U. S.*, 45 Fed. (2d), 55; and *Van Pelt* v. *U. S.*, 240 Fed. 346; and the Circuit Court of Appeals for the Eighth Circuit in *Biggerstaff* v. *U. S.*, 260 Fed. 926; *Drossos* v. *U. S.*, 16 Fed. (2d), 833, and *Sloan* v. *U. S.*, 287 Fed. 91.

Wherefore, your petitioners pray that a writ of certiorari issue under the seal of this Court, directed to the Circuit Court of Appeals for the Seventh Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said Circuit Court had in the case numbered and entitled on its docket, No. 4649, *Jack Gebardi, alias Jack McGurn, alias Jim Vincent D'Oro, and Louise Rolfe, Appellants* v. *The United States of America, Appellee,* to the end that this cause may be reviewed and determined by this Court as provided for by the statutes of the United States; and that the judgment herein of said Circuit Court be reversed by the Court, and for such further relief as to this Court may seem proper.

Jack Gebardi,
Louise Rolfe Gebardi,
By William F. Waugh,
Their Attorney.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Opinions of Courts Below.

The opinion of the Circuit Court of Appeals for the Seventh Circuit (not yet reported) appears in full in the Record, pages 177-185. No formal opinion was rendered by the District Court.

II.

Jurisdiction.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, Section 347, Title 28, U. S. C. A.

III.

Statement of the Case.

Jack Gebardi, a married man, and Louise Rolfe, an unmarried woman, both of Chicago, Illinois, who had had adulterous relations for a period of from three to seven years (R. 110-114), on or about December 22, 1928, went from Chicago, Illinois, to Miami, Florida, and while there resided as man and wife at the Dallas Park Hotel (R. 112) for about a week, and at 453 North West 3rd Street for about three weeks (R. 22), returning to Chicago via Jacksonville on about January 24, 1929 (R. 112), stayed at the LaSalle Hotel one day (R. 27, 39), and on January 25, 1929, after adding Anthony Gebardi, a brother, to their party, left for Jacksonville, Florida (R. 111), stayed there one hour and went on to St. Augustine (R. 111), remained

there four hours, and then continued on to Biloxi, Mississippi, where they registered at the Edgewater Gulf Hotel as Mr. and Mrs. Vincent D'Oro and Anthony D'Oro (R. 107, Exs. 78, 79). Three days later they boarded a train at Gulfport, Mississippi, and returned to Chicago (R. 111). On their arrival, the petitioners went to live at the Stevens Hotel (R. 111).

The indictment charges three conspiracies to transport Rolfe in interstate commerce for the purpose of their having unlawful sexual intercourse. Count I is based upon that portion of the trip from Chicago to Miami (R. 3); Count III, on that portion of the journey from Chicago to Jacksonville (R. 5); and Count II, the return trip from Gulfport to Chicago (R. 4). Before the trial, Gebardi was divorced from his first wife and married Rolfe (R. 16). The case was tried without the intervention of a jury.

IV.

Specifications of Error.

1. The Circuit Court of Appeals erred in holding that the agreement between Gebardi and Rolfe was punishable as three separate and distinct conspiracies.

2. The Circuit Court of Appeals erred in holding that the consent of Rolfe to travel with Gebardi in interstate commerce for the purpose of having sexual intercourse with him constitutes a conspiracy to violate the White Slave Traffic Act.

3. The Circuit Court of Appeals erred in holding that proof of sexual intercourse, during and following transportation in interstate commerce, between Gebardi and Rolfe, who had lived in a state of adultery prior thereto, established that the transportation was for an immoral purpose.

V.

Argument.

(1) SINGLE CONSPIRACY PUNISHED AS THREE SEPARATE AND DISTINCT OFFENSES.

The Circuit Court of Appeals in this case has approved the action of the government in the splitting up of one conspiracy and the prosecution of petitioners on an indictment containing three counts, each of which said counts is predicated upon a part of the same crime, and the imposition of sentences on the said three counts, which are treble the amount which could have been imposed for one offense.

In that connection we desire to invite the Court's attention to the case of *Murphy* v. *U. S.*, 285 Fed. 801 (C. C. A. 7th Cir.), where the question presented was whether or not a conviction based upon two counts, one charging a conspiracy to rob, and the other charging a conspiracy to have and conceal the property so secured, could be maintained. On page 817 the Court says:

> "What is ordinarily contemplated when robbery is committed? Does the robber intend merely to part the robbed of his property? Or does he intend to accomplish two things—the unlawful taking and the unlawful keeping of another's property? And, with more pertinency, may it not be asked whether a criminal conspiracy to rob, conceived and successfully carried out by A., B., and C., may be divided and redivided? Can it be said that A., B., and C., in entering upon the criminal enterprise to rob the United States mail, did not as a part of that conspiracy intend to unlawfully

take the mail pouches *and to retain the possession of the property* secured through this robbery?

* * *

The Fifth Amendment to the Constitution protects all against double punishment for the same offense. Its enforcement and its application demand a test which is a practical, not a theoretical one. It is the evidence, and not the theory of the pleader, to which we must look to determine this issue. And it is needless to add that one accused of crime, regardless of kind or magnitude of the offense, is entitled to the protection of this section of the Constitution. The sentence on this count therefore cannot be sustained."

This Court has held in two cases, *In re* Snow, 120 U. S. 274, and *Hans Nielsen, Petitioner,* 131 U. S. 176, that the offense of cohabiting is a continuing one, and can be committed but once for the purposes of indictment or prosecution. Although the White Slave Traffic Act was not there under consideration, the same principles are applicable. On page 282 of the *Snow case,* the Court says:

"On the same principle there might have been an indictment covering each of the thirty-five months, with imprisonment for seventeen years and a half and fines amounting to $10,500, or even an indictment covering every week, with imprisonment for seventy-four years and fines amounting to $44,400; and so on, *ad infinitum,* for smaller periods of time. It is to prevent such an application of penal laws, that the rule has obtained that a continuing offense of the character of the one in this case can be committed but once, for the purposes of indictment or prosecution, prior to the time the prosecution is instituted."

Lindley, District Judge, who entered the judgment and imposed the sentences complained of in the case at bar, in *U. S.* v. *Weiss*, 293 Fed. 992, in sustaining pleas of former jeopardy to an indictment charging conspiracy, recognized and followed the principles of law announced in the *Murphy* and *Snow cases*, in the following language (p. 994):

> "(1) At the threshold it must be noted that the government cannot split up one conspiracy into different indictments, and prosecute all of them, but that prosecution for any part of a single crime bars any further prosecution based upon the whole or a part of the same crime. *Murphy* v. *U. S.* (C. C. A.) 285 Fed. 804, at page 816; *In re* Snow, 120 U. S. 274, 7 Sup. Ct. 556, 30 L. Ed. 658; 16 Corpus Juris, 270, and cases there cited."

We believe that the only logical conclusion which can be arrived at from the application of the foregoing principles to the case at bar, has been reached by Alschuler, Circuit Judge, who has summed the matter up in the following language in his dissenting opinion (Opinion, p. 9; R. 185):

> "But assuming conspiracy was shown, I do not believe the evidence shows a series of conspiracies, unless it may be said that each time the persons in their travels approached and crossed another state line or halted in their journey a new conspiracy to further transport her is thereby presumptively manifested.
>
> If a conspiracy is necessarily to be presumed from the substantive acts shown, it is far more reasonable to presume that there was a single general conspiracy

to travel together interstate for this unlawful purpose, than that a new conspiracy was formed for each section of their travels. The contention that upon this evidence there appears one conspiracy to transport the woman from Chicago, and a separate conspiracy to transport her back to Chicago, should find refutation in its mere statement."

(2) DECISION IN U. S. v. HOLTE, 236 U. S. 140, MISAPPLIED.

The Circuit Court of Appeals, in answer to an attack on the indictment and proof of the conspiracy alleged in this case, says the following (Opinion, p. 2, R. 178):

"This contention we dispose of without discussion on authority of *United States* v. *Holte,* 236 U. S. 140."

It is our contention that the majority of the court committed serious error in disposing of that contention without discussion. The *Holte case* merely decided that it was possible for a woman to be a co-conspirator under certain circumstances, and that the indictment would survive a demurrer. The case does not hold that the consent of a woman to be transported under any circumstances establishes her guilt as a conspirator. On this subject we desire to invite the attention of the court to the reasoning of Judge Alschuler as set out in the dissenting opinion (R. 183, 184):

"The majority opinion is rested on the authority of *United States* v. *Holte,* 236 U. S. 140, which dealt with a demurrer by the woman to an indictment of a man and woman charging them with conspiracy to cause her to be transported interstate for purposes of prostitution. The court said it did not have to consider

what evidence would be necessary to convict a woman under such an indictment, 'but only to decide whether it is impossible for the transported woman to be guilty of a crime in conspiring as alleged.'

If the supposititious case stated in that opinion indicates the general class of cases which the court had in mind as such where the transported woman might be guilty of conspiracy to have herself transported, it is so far from the class indicated by the facts in the instant case as quite to exclude it. Here we are not dealing with the indictment merely, but with the evidence. I cannot believe that where all that the record shows is the likelihood that before such a journey actually commenced the woman manifested a willingness to undertake it, her crime of conspiracy thereby appears."

Not only is the *Holte case* not controlling, but there is a distinction between the indictment in that case and the indictment in the case at bar. In the former case the indictment charged the man and woman with conspiracy to transport her from Illinois to Wisconsin for purposes of prostitution; this of course meant general promiscuity of intercourse and did not at all imply any sexual intercourse between the man and woman defendant. In the indictment in the instant case each count charges petitioners' purpose in their travels to be "unlawful sexual intercourse, they not then and there being husband and wife," to wit: Adultery ("they" referred to being indisputably petitioners, as the proof at the trial disclosed).

The indictment also charged that there were others than petitioners involved in the conspiracy, and it is conceivable that a number of persons may conspire that two of

them commit adultery. It may be, therefore, that the indictment would, under the rule in *U. S.* v. *Holte,* have successfully withstood an attack as to its sufficiency in law, but as the proof limited the activities entirely to petitioners (notwithstanding there was evidence that Gebardi's brother was with them on some part of the trip and that others lived with them in the house in Miami), there is neither proof nor contention that the brother or any of these other people were the unknown conspirators mentioned in the indictment.

Petitioners therefore come before this Honorable Court upon the record, which is the Government's proof, and urge that an unlawful conspiracy was not and could not under the facts have been proven against them, leaving the sufficiency of the indictment upon demurrer entirely out of this case.

It has been uniformly held and has always been recognized as the law that where the cooperation of two people is necessary to complete an act which when consummated is a crime, such cooperation constitutes the substantive crime and may not be bent to conspiracy to commit that offense.

United States v. *Dietrich,* 126 Fed. 664 (Cir. Ct., D. Neb.), supplies an instance of the application of this rule to other offenses impossible of completion without joint accord and action, Judge Van Devanter holding that there can be no indictment for conspiracy between the intended giver or givers and the intended taker or takers of a bribe.

The most recently published decision on this proposition is *U. S.* v. *Sager,* 49 Fed. (2d) (C. C. A. 2d Circuit) 725. Conviction of defendants upon a conspiracy charge was reversed upon the application of the rule that where

concert is necessary to an offense, conspiracy does not lie, and upon appeal, the count of the indictment charging conspiracy between the person bribing the juror and the juror accepting the bribe was held not to show a conspiracy.

So firmly established is the general limitation upon the use of the conspiracy count and its specific application to adultery as declared by the Courts, *e. g., Shannon* v. *Commonwealth,* 14 Pa. 226, *State of Iowa* v. *Law,* 179 N. W. 145 and cases there cited, and by Dr. Wharton (II Wharton's Criminal Law, Eleventh Edition, Sec. 1602, p. 1746), that a careful search of the Federal Reports covering the many years since those decisions does not reveal a single federal case involving a conspiracy charge to commit adultery unless it be *Corbett* v. *United States,* 299 Fed. 27 (C. C. A., Ninth Circuit), where the point here made was not presented or considered.

It follows, therefore, that the Circuit Court of Appeals erred in sustaining the conviction of petitioners on the authority of *U. S.* v. *Holte, supra,* and that a proper interpretation and application of the holding in that case necessitates a reversal of the judgment.

(3) Decision in conflict with decisions of other Courts of Appeal.

The Circuit Court of Appeals, in this case, held that proof of sexual intercourse between Gebardi and Rolfe established that the transportation had for its object an immoral purpose within the meaning of the White Slave Traffic Act (Sec. 398, Title 18, U. S. C. A.).

Many cases have been decided by Circuit Courts of Appeal of other circuits where, as in the instant case, im-

moral relations existed between the accused for long periods of time prior to trips in interstate commerce. Where the proof failed to show that the transportation was to effect, or at least to facilitate, the sex relationship, but on the contrary acted as a deterrent to the continuation of that relationship, the courts have held that such proof did not sustain convictions under the Act. It is true that in our case the conviction is for conspiracies to violate that Act. *Nevertheless, we urge that in order to sustain the conviction there must be proof beyond a reasonable doubt that the conspiracy had for its object interstate transportation for an immoral purpose.*

The decisions in conflict with the holding in the instant case are the following:

FOURTH CIRCUIT.

Van Pelt v. *U. S.*, 240 Fed. 346, p. 349:

> "Before the defendant could properly be convicted there must be evidence that the purpose, or one of the purposes, of the defendant, if he had more than one, in bringing the prosecutrix to Baltimore, was that he might have sexual intercourse with her. No possible reason is suggested by the record why he should have gone to the trouble and expense of having her make such a trip, and making it with her, merely in order that he might twice more exercise a liberty which he had taken hundreds of times before, and could just as well have taken an indefinite number of times more, if she had remained at home. * * * The defendant may have anticipated that while on the journey he would gratify his desire, as he doubtless would

have done, had the trip never been taken; but there is no evidence from which it can reasonably be held that such anticipation played any part whatever in inducing him to arrange for her coming to Baltimore."

Fisher v. *U. S.*, 266 Fed. 667, pp. 669-670.

Hunter v. *U. S.*, 45 Fed. (2d), 55, p. 56.

EIGHTH CIRCUIT.

Biggerstaff v. *U. S.*, 260 Fed. 926, p. 928:

"The accused was convicted of violating the first clause of the White Slave Traffic Act, which requires that the transportation in interstate commerce shall be for an immoral purpose specified. The mere fact that an immoral act was committed on an interstate journey does not of itself constitute that essential element of the offense. Its relevance in that respect is evidential, not substantive, and when relied on as evidence of a preconceived purpose care must be taken to regard it in a true perspective. The act may have been a casual incident in the journey, without forethought or anticipation at the time it was begun."

Sloan v. *U. S.*, 287 Fed. 91, p. 93.

Drossos v. *U. S.*, 16 Fed. (2d), 833, p. 834.

SECOND CIRCUIT.

Alpert v. *U. S.*, 12 Fed. (2d) 352, p. 354:

"The only evidence of what took place at the hotel in Pottsville was that given by the young woman, and whether or not the plaintiff in error intended to indulge in sexual relations before leaving the state of New York is left entirely to inference. There is no evidence of any arrangement between the couple

> or understanding between them for illicit intercourse after going to Pennsylvania. The fact that a journey from one state to another is followed by such intercourse, where the journey was not for that purpose, but wholly for other reasons, cannot be regarded as a violation of that act. *United States* v. *Fisher* (C. C. A.) 266 F. 670. To justify conviction, there should be convincing evidence of the intention to transport the woman for immoral purposes, and that it was formed before the woman reached the state to which she was being transported."

The uncontradicted statements of petitioners introduced in evidence by the Government clearly show that illicit relations between Gebardi and Rolfe had existed and continued for a period of from three (R. 114) to seven (R. 113) years prior to the transportation alleged in this case. In view of that relationship, it cannot be inferred that the transportation was for an immoral purpose merely because the relations which had existed theretofore were continued after their departure from Chicago, and especially in view of the further fact that they were accompanied by Gebardi's brother. The brothers' presence militates against the inference that the transportation had as its object, immoral relations between petitioners. The trip in no way facilitated the immoral relations.

We contend, therefore, that the principles of law enunciated in the foregoing cases apply to the case at bar, and that the holding of the Circuit Court of Appeals for the Seventh Circuit is clearly in conflict with those decisions.

Conclusion.

It is submitted that for the reasons stated the writ of certiorari should be granted.

Respectfully submitted,

WILLIAM F. WAUGH,
Attorney for Jack Gebardi and Louise Rolfe Gebardi, Petitioners.